

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:LAD:LA:TL-N-1926-00
KHAnkeny

date: August 23, 2000

to: Examination Division, Los Angeles District, Glendale
Onetta Robinson, Revenue Agent

from: District Counsel, Los Angeles District, Los Angeles

subject: Extending the period of limitations for [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

URGENCY OF YOUR REQUEST

By memorandum dated August 21, 2000, you provided documents and requested advice about extending the period of limitations for the [REDACTED] tax year of [REDACTED] and its subsidiary. You orally stated that if more documents were required, you would not have time to obtain them because the current period of limitations expires on [REDACTED]. I explained that, in accordance with CCDM(35)3(19)4, we must furnish a copy of this advisory opinion applying well-settled principles of law to the Assistant Chief Counsel (Field Service) for 10-day, post-issuance review. You asked if I could let you know by September 8, 2000 whether the Assistant Chief Counsel agrees with this advice.

ISSUE

For the [REDACTED] tax year, which entity is the proper party to sign the Form 872 to extend the time to assess the income tax liability of [REDACTED] and its subsidiary?

CONCLUSION

[REDACTED] should sign the Form 872 for the consolidated group. Its president, vice president, treasurer, assistant treasurer, chief accounting officer, or any other current officer duly authorized to act may sign the Form 872 on its behalf.

FACTS

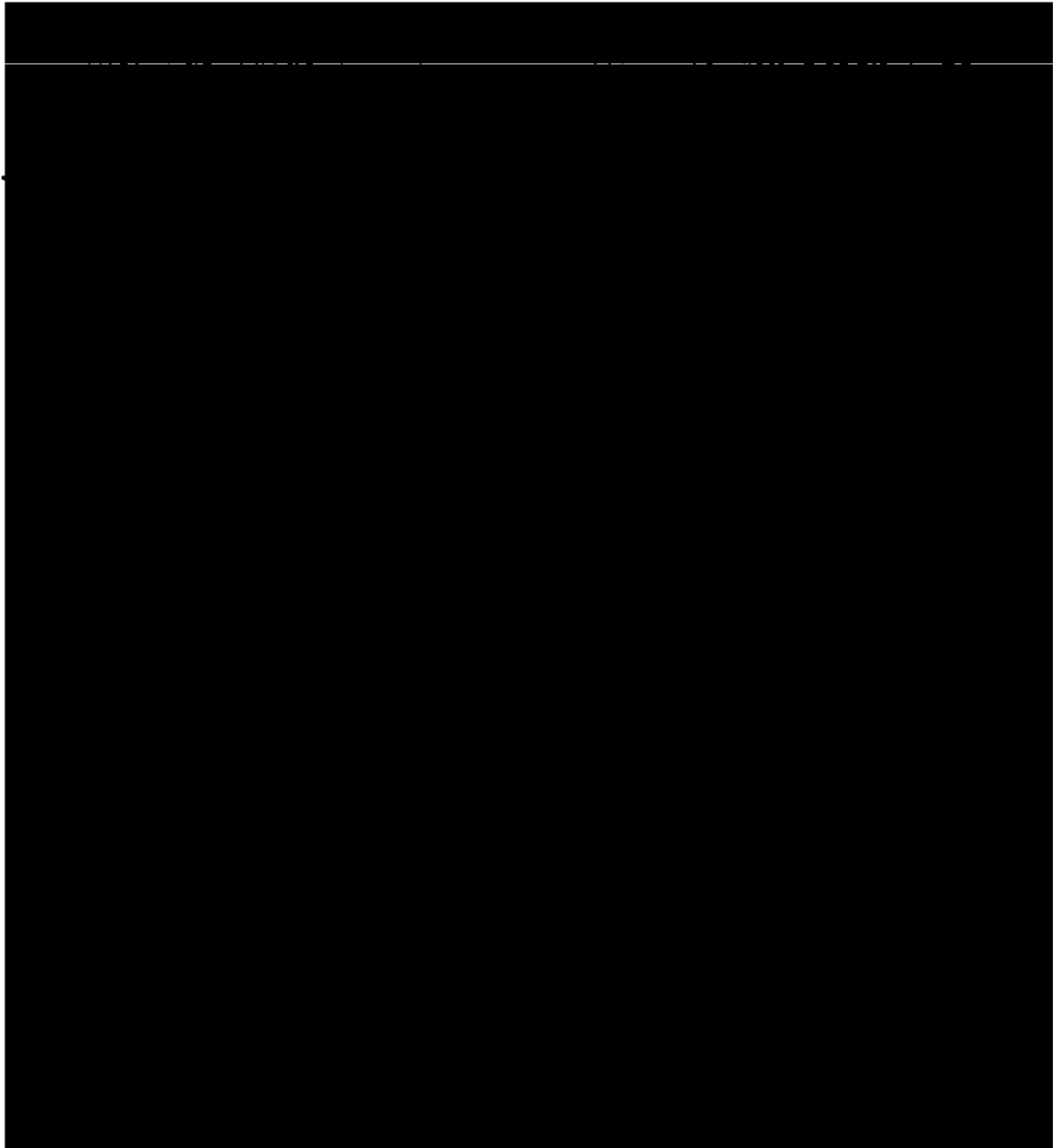
On [REDACTED], a [REDACTED] consolidated income tax return was filed on behalf of "[REDACTED]" (EIN [REDACTED]). According to the return, "[REDACTED]" owned all [REDACTED] shares of [REDACTED] (EIN [REDACTED]). [REDACTED] was incorporated in California.

On [REDACTED], [REDACTED] was incorporated in Delaware, and [REDACTED] owned all of its stock. On [REDACTED], [REDACTED] was incorporated in Delaware, and [REDACTED] owned all of its stock.

Then there was a recapitalization, transferring majority ownership of the parent corporation to the management and employees. According to pages 13-14 of the [REDACTED] Form 10-K:

[REDACTED]

¹ In the Form 10-K, "Parent" is defined as [REDACTED], and "Company" is defined as [REDACTED]. But, in [REDACTED], the name of the parent was still [REDACTED], and the name of the subsidiary was [REDACTED].



On [REDACTED], [REDACTED]. filed a Certificate of Amendment of Certificate of Incorporation with the Delaware Secretary of State, changing its name from [REDACTED] to [REDACTED].

Next, on [REDACTED] [REDACTED] filed a Certificate of Ownership and Merger with the Delaware Secretary of State, resolving to merge [REDACTED] into [REDACTED]
[REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, on [REDACTED], [REDACTED] filed its own Certificate of Ownership and Merger with the Delaware Secretary of State. It resolved to merge into [REDACTED], which then changed its name to [REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On [REDACTED], a consolidated income tax return was filed on behalf of " [REDACTED] (EIN [REDACTED]) for the tax year beginning on [REDACTED] and ending on [REDACTED]. According to the return, " [REDACTED] owned [REDACTED] shares of " [REDACTED] (EIN [REDACTED]).

On [REDACTED] you confirmed that [REDACTED] (EIN [REDACTED]) still exists and is the common parent of the consolidated group.

DISCUSSION

Generally, the common parent is the exclusive agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each such subsidiary. Id.

However, [REDACTED] cannot be the exclusive agent under Treas. Reg. § 1.1502-77(a) because it is no longer the common parent. On [REDACTED] when [REDACTED] merged into [REDACTED], which became the surviving corporation, [REDACTED] ceased to exist.

Temp. Reg. § 1.1502-77T, which was promulgated in 1988 to supplement Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a). When a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. § 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group for purposes of mailing notices of deficiency and for executing waivers of the period of limitations. Under Temp. Reg. § 1.1502-77T(a)(4), any one or more of the following corporations may act as alternative agents for the group:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies,

(ii) A successor to the former common parent in a transaction to which § 381(a) applies,

(iii) The agent designated by the group under section 1.1502-77(d), or

(iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Temp. Reg. § 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. § 1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. § 1.1502-77 by adding paragraph (e), cross referencing to Temp. Reg. § 1.1502-77T.

Subparagraph (i) does not apply. On [REDACTED] when [REDACTED] merged into [REDACTED], which became the surviving corporation, [REDACTED] ceased to exist.

However, subparagraph (ii) does apply. Subparagraph (ii) provides that a successor to the former common parent in a transaction to which section 381(a) applies is an alternative agent. Section 381(a)(2) concerns a transfer in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of section 368(a)(1). A reorganization described in

subparagraph (A) is a statutory merger or consolidation. A reorganization described in subparagraph (F) is a mere change in identity, form, or place of organization.

According to the Certificate of Ownership and Merger, the [REDACTED] reorganization constituted a merger under section 253 of the Delaware General Corporation Law. Section 253(a) permits a parent corporation to merge into a subsidiary. Del Code Ann. tit. 8, § 253. Therefore, the [REDACTED] reorganization appears to have been a statutory merger described in subparagraph (A) of section 368(a)(1) of the Internal Revenue Code. However, the taxpayer treated the reorganization as a mere change in identity, form, or place of organization described in subparagraph (F). [REDACTED] filed the [REDACTED] return for the full fiscal year. It did not close its taxable year on the date of the reorganization. I.R.C. § 381(b)(1). In addition, the new parent corporation kept the former parent corporation's EIN. Regardless of whether the merger was a reorganization described in subparagraph (A) or (F), [REDACTED], as the successor to the former common parent, may act as an alternative agent for the [REDACTED] consolidated group.

Subparagraph (iii) provides that the agent designated by the group under Treas. Reg. § 1.1502-77(d) is an alternative agent. It is inapplicable because [REDACTED] did not dissolve or contemplated dissolution, contrary to the requirement of Treas. Reg. § 1.1502-77(d).

Finally, according to subparagraph (iv), if under Treas. Reg. § 1.1502-75(d)(2) or (3) the group remains in existence following a mere change in identity, a transfer of assets to a subsidiary, or a reverse acquisition, then the common parent of the group at the time the waiver is given is an alternative agent.

Subparagraph (iv) may also apply. [REDACTED] changed its name to [REDACTED]. Then, [REDACTED] merged into a subsidiary, [REDACTED]. If subparagraph (iv) did apply, we would focus on [REDACTED] as the common parent of the group at the time the Form 872 will be signed. But, we would still conclude that [REDACTED] may act as an alternative agent to the [REDACTED] consolidated group.

In summary, [REDACTED] is an "alternative agent" under subparagraph (i) and possibly subparagraph (iv) of Temp. Reg. § 1.1502-77T(a)(4). Therefore, [REDACTED] should sign the Form 872 for the [REDACTED] tax year. We base our conclusion

on the facts, which you confirmed, that [REDACTED] (EIN [REDACTED]) still exists and is the common parent of the consolidated group.

In your memorandum, you stressed that there were two other reorganizations. First, there was a recapitalization in [REDACTED] when majority ownership of [REDACTED] was transferred to the management and employees. However, section 381(a)(2) does not apply to recapitalizations, which are described in subparagraph (E) of section 368(a)(1).

Second, the subsidiary reorganized on [REDACTED] merged into [REDACTED], which then changed its name to [REDACTED]. In other words, [REDACTED]'s subsidiary became [REDACTED]. However, the subsidiary named [REDACTED] has a different EIN ([REDACTED]) and is a different corporation from the former common parent, which was also named [REDACTED] (EIN [REDACTED]). The relevance of subsidiary's reorganization to the agency issue is that you must be careful to associate the correct EIN with the former common parent's name.

On the first page of the Form 872, the taxpayer's name should be stated as:

[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED] EIN [REDACTED]) *

* This is with respect to the consolidated income tax liability of [REDACTED] for the tax year ending [REDACTED].

The signature block on the second page of the Form 872 should read:

CORPORATE NAME [REDACTED] (EIN [REDACTED])

According to the Certificates of Amendment to the Certificates of Incorporation, the parent corporation's name was [REDACTED]." and now is [REDACTED]." In addition, [REDACTED] reported only one subsidiary on its [REDACTED] return. Nonetheless, the names used on the Form 872 should be precisely as stated in the [REDACTED] and [REDACTED] returns, "[REDACTED]" and "[REDACTED]."

The Form 872 should be signed by a current, duly authorized officer of [REDACTED] I.R.C. §§ 6061(a), 6062; Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. After the signature line, the name of the signatory and his title should be typed in.

The best practice would be to obtain [REDACTED]'s latest bylaws and most recent corporate minutes to determine the identity of its current officers. If you have insufficient time to do that, we recommend that you obtain a written verification from [REDACTED] that the signatory is a current officer of [REDACTED], authorized to sign the Form 872 on its behalf.

Finally, you should notify [REDACTED] of its right to refuse or to limit the extension of the period of limitations. Section 6501(c)(4)(B) provides that "[t]he Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent."

Please call me at 213-894-3027, ext. 155, if you have any questions.

JAMES A. NELSON
District Counsel

By: _____

KATHERINE H. ANKENY
Attorney